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In the Supreme Court of the United States

OCTOBER TERM, 1987

ETIENNE BOERENVEEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who entered the United States on a visa identifying him as a "temporary visitor for pleasure," was entitled to diplomatic immunity.

2. Whether petitioner should have been tried separately from his co-conspirators.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. Supp. App. A9) is noted at 830 F.2d 1130. The orders of the district court (Pet. App. A1-A8 and No. 110, Orig. App. 30-37)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1987, and a petition for rehearing was

[1] The appendix to the petition does not contain the oral ruling of the district court denying petitioner's motion to dismiss the indictment on grounds of diplomatic immunity. That transcript excerpt was appended, however, to the motion for leave to file a petition for a writ of habeas corpus that was filed in this Court by the Republic of Suriname on petitioner's behalf on September 4, 1987. *In the Matter of the Republic of Suriname, ex rel. Etienne Boerenveen,* No. 110, Orig. That motion raised the same diplomatic immunity issue that is presented in the instant petition. This Court denied the motion on November 30, 1987.

denied on October 27, 1987. The petition for a writ of certiorari was filed on December 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to travel in interstate or foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 371 (Count 1), and of conspiring to import and to distribute cocaine, in violation of 21 U.S.C. 963 (Count 2). He was sentenced to concurrent terms of five years' imprisonment on Count 1, and 12 years' imprisonment on Count 2. The court of appeals affirmed without opinion (Pet. Supp. App. A9).

1. The evidence at trial showed that in February 1986, Drug Enforcement Administration (DEA) agent Kenneth Peterson telephoned Cilvion Heymans in Paramaribo, Suriname, to revive negotiations for the purchase of cocaine.[2] Heymans said that he could not get cocaine himself. He claimed, however, that he had connections with "the big leader of Suriname," and he offered Suriname "as a transit or harbor with the backing of the government" for a shipment of cocaine. Gov't C.A. Br. 3. In a subsequent conversation, Heymans offered to travel to the United States with the man who could offer safe passage for the cocaine. Heymans explained that the man "is the second in command in the country." In other conversations, Heymans stated that his contacts could provide harbors and airstrips. A meeting in Miami was arranged; Heymans agreed to travel to the United States on March 21 with two other persons and to

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[2] The pertinent facts are taken from the government's brief in the court of appeals.

return to Suriname on March 24. Gov't C.A. Br. 4. Heymans warned Peterson that the Surinamese official wanted a large operation that would generate millions of dollars.

In 1986, petitioner was a 21-year old Commander of the Army of Suriname and Chairman of the State Fishery Commission. In March 1986, the Government of Suriname asked the local United States Embassy to issue petitioner a diplomatic visa for official travel to this country. The Embassy refused to issue the visa because the Surinamese official making the request failed to disclose the purpose of petitioner's travel. The United States Embassy ultimately issued a diplomatic visa (see 22 C.F.R. 41.100) but assigned petitioner a "B-2" classification, identifying him as a "temporary visitor for pleasure" (22 C.F.R. 41.12). The Surinamese official then requested that petitioner be assigned an "A-1" classification, identifying him as a "public minister" (see *ibid.*). The Embassy refused that request, indicating that the United States would not issue a visa of that classification without knowing the purpose of the travel. See Gov't C.A. Br. 22-24.

Petitioner used the "B-2" visa to enter this country on March 21, 1986, with Cilvion Heymans and Cilvion's son Ricardo. Cilvion met with Peterson that day and told Peterson that he had brought petitioner with him. Heymans described petitioner as the "biggest man in the country," and he told Peterson that petitioner would give him "all the protection you need" if Peterson was willing to "pay the price." That evening, Peterson met with petitioner, who was accompanied by Cilvion and Ricardo Heymans. Petitioner discussed the runway and refueling facilities in Suriname and asked about fees and percentages. Gov't C.A. Br. 5. Petitioner demanded $1,000,000 per shipment. Three days later, Peterson met again with petitioner, Cilvion, and Ricardo. At that meeting they discussed the port facilities and trucks available to transport ether and cocaine. When

Peterson pressed petitioner for a clear explanation of who he was and why his guarantees of safety could be trusted, petitioner replied, "I am the second man up there in Suriname." Gov't C.A. Br. 6-7. Petitioner was then arrested in connection with the scheme to import multimillion dollar quantities of cocaine into this country. See Gov't C.A. Br. 3-7, 24.

After petitioner's arrest, the State Department's Associate Chief of Protocol of the United States made the following certification regarding petitioner's diplomatic status (Gov't C.A. Br. 25-26 (quoting GX 1)):

> A thorough search of the official records of the United States Department of State reveals that [petitioner and the Heymans] are not currently, and have not been in the past, recognized by the Department of State in any capacity which would entitle them to immunity from jurisdiction accorded diplomatic or consular personnel under applicable international law.

Thereafter, the Ambassador of Suriname met with officials of the State Department and claimed that petitioner was entitled to diplomatic immunity because he had entered the United States on a diplomatic passport for the conduct of official business (Gov't C.A. Br. 24-25). The State Department transmitted a diplomatic note unequivocally rejecting the claim of diplomatic immunity (*id.* at 25 (quoting GX 2)):

> Based upon a careful review of the representations of the Government of Suriname and the supporting documentation provided by Ambassador Halfhide, the Department has concluded that [petitioner] is not entitled, as a matter of international law, to immunity from the criminal jurisdiction of the United States. While certain courtesies may be extended to individuals traveling on diplomatic passports, such passports do not confer immunities under international law. Unless

> the concerned states have otherwise agreed, an individual is entitled to diplomatic privileges and immunities only as a consequence of his status as a diplomatic agent assigned to the diplomatic mission of the sending state to assume diplomatic responsibilities in the receiving State on a regular basis, or, having been assigned to assume such responsibilities in one country, is passing through another country either directly enroute to or returning from that assignment. [Petitioner] does not fall into either category. Nor is there a treaty or other international agreement between Suriname and the United States providing diplomatic privileges and immunities for government officials temporarily in the other's territory to engage in trade between the two states, promote investment, or otherwise conduct official business.

2. Shortly after his indictment, petitioner moved to dismiss the conspiracy charges on the ground that he was entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, art. 31, 23 U.S.T. 3227 (Vienna Convention). The district court denied the motion to dismiss (Pet. App. A1-A5; No. 110, Orig. App. 30-37). First, the court affirmed the previous finding of a magistrate that petitioner "was not a part of a mission performing mission functions under the terms of the Vienna Convention" (Pet. App. A4; No. 110, Orig. App. 34). The court explained (No. 110, Orig. App. 34-35) that petitioner's "appointment to a mission and request for diplomatic status was neither properly notified to nor recognized by the United States." Second, the court observed (*id.* at 35-36) that, absent exceptional circumstances, it was bound to accept the determination of the State Department that petitioner was not entitled to diplomatic immunity. Finally, the court concluded (*id.* at 36-37) that, even if it was not bound by the State Depart-

ment's determination, there had been no abuse of discretion by the State Department warranting judicial intervention.

3. Prior to trial, petitioner moved for a severance from his two co-defendants, the Heymans. In support of his motion, petitioner presented an affidavit from Cilvion Heymans. That affidavit stated that Heymans would not testify on petitioner's behalf in a joint trial but that he would so testify if a severance were granted and Heymans were tried first. In the affidavit, Heymans claimed that petitioner was a friend of his son, Ricardo, and that petitioner knew nothing about the proposed narcotics venture prior to his visit to Miami. He claimed that it was sheer coincidence that he and petitioner flew to Miami on the same day and stayed in the same hotel. According to Heymans, he lured petitioner to the first meeting with Agent Peterson by telling petitioner that they were going to meet some men who wanted to invest in the cattle and lumber industry in Suriname. Heymans averred that petitioner first learned that the meeting concerned drugs when the subject was raised by Agent Peterson. The affidavit did not discuss the second meeting between Peterson, the Heymans, and petitioner.

After a hearing at which the district court viewed the videotaped meetings between Peterson and the three co-defendants, the district court denied the motion to sever. The court found that the affidavit submitted by co-defendant Cilvion Heymans "is non-specific, it is extremely generalized, it contains many conclusions and is not in itself exonerative." Pet. App. A7-A8. The court further noted that petitioner had failed to clear up the inadequacies in the affidavit by offering "to produce evidence in the nature of testimony of Cilvion Heymans." In conclusion, the court stated (3 Tr. 145):

> To the extent that anything contained in the aforementioned affidavit contains anything approaching

> the requisite specific exonerative fact, at this juncture, the Court is constrained to conclude that this evidence is overwhelmingly contradicted by the Government's proffer in open court as well as by the various tapes which this Court had occasion to review * * *."

4. On appeal, petitioner raised both the diplomatic immunity and severance claims. The court of appeals affirmed petitioner's convictions without opinion (Pet. Supp. App. A9).

ARGUMENT

1. Petitioner first contends (Pet. 4-5) that he was entitled to diplomatic immunity. The same issue was raised by the Republic of Suriname in a motion for leave to file a petition for a writ of habeas corpus on petitioner's behalf. No. 110, Orig. (filed Sept. 4, 1987). On November 30, 1987, this Court denied the motion. Petitioner makes no new arguments in support of his claim of diplomatic immunity here, and he alleges no conflict among the circuits. Accordingly, his request for review by writ of certiorari should likewise be denied.

As we noted in our brief in opposition to Suriname's motion, the determination of an alien's diplomatic status, made by the Executive Branch, is a political question. That determination goes to the heart of the President's constitutionally prescribed power to conduct foreign affairs and to his exclusive authority to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. Thus, "the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." *Abdulaziz* v. *Metropolitan Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984). See, *e.g.*, *In re Baiz*, 135 U.S. 403, 431-432 (1890); *Carrera* v. *Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949); *United States* v. *Fitzpatrick*, 214 F. Supp. 425, 433

(S.D.N.Y. 1963); *United States* v. *Coplon*, 88 F. Supp. 915, 920-921 (S.D.N.Y. 1950). In this case, the State Department expressly certified that petitioner is not recognized "in any capacity which would entitle [him] to immunity from jurisdiction accorded diplomatic or consular personnel under applicable international law" (GX 1). The State Department's determination accordingly resolves the matter. See Restatement (Revised) of the Foreign Relations Law of the United States § 461 reporters' note 1 (Tent. Draft No. 4, 1983); Restatement (Second) of the Foreign Relations Law of the United States § 73 comment i (1965).

Petitioner argues that he is entitled to diplomatic immunity because he was issued a "diplomatic" visa. The holder of a diplomatic visa, however, is not necessarily a diplomatic agent, and the State Department's issuance of a diplomatic visa does not, of itself, confer diplomatic immunity. Generally, a sending state issues to its diplomatic agent a diplomatic passport, and the receiving state gives him a diplomatic visa, but such passports and visas are sometimes issued as a courtesy to other persons, including foreign officials on official business in the United States, and are not sufficient evidence that the holder enjoys diplomatic privileges and immunities in the receiving state. See Restatement (Revised) of the Foreign Relations Law of the United States § 461, reporters' note 1 (Tent. Draft No. 4, 1983). See also, *e.g.*, *United States* v. *Arizti*, 229 F. Supp. 53 (S.D.N.Y. 1964) (denying immunity to career diplomat who entered the United States on a diplomatic visa). In this case, the Government of Suriname never sought to accredit petitioner as a head or member of its mission. Accordingly, he was admitted to this country solely as a "temporary visitor for pleasure." In these circumstances, his claim of diplomatic immunity is baseless.

2. Petitioner next contends (Pet. 5-7) that he should have been granted a severance from his two co-defendants,

the Heymans. He claims that where co-conspirator declarations will be introduced, severance motions are not subject to the discretion of the trial court; in that situation, he claims, the Compulsory Process Clause suggests that a "higher standard" is required. In support of this "higher standard," petitioner relies on *United States* v. *Inadi,* 475 U.S. 387 (1986), and *Bourjaily* v. *United States,* No. 85-6725 (June 23, 1987). There is no merit to that claim.

The law is well settled that the matter of severance is committed to the discretion of the district court. See Fed. R. Crim. P. 14 and advisory committee notes; *United States* v. *Fischl,* 797 F.2d 306, 313 (6th Cir. 1986); *United States* v. *Roth,* 736 F.2d 1222, 1228-1229 (8th Cir.), cert. denied, 469 U.S. 1058 (1984). A defendant is not entitled to a severance so that his co-defendant can testify on his behalf unless he makes a detailed proffer of testimony that is clearly and convincingly exculpatory in nature. Such a proffer is insufficient if it is conclusional or patently unworthy of belief. *United States* v. *Voss,* 787 F.2d 393, 401 (8th Cir. 1986), cert. denied, No. 86-5398 (Oct. 14, 1986); *United States* v. *Andrus,* 775 F.2d 825, 846-847 (7th Cir. 1985); *United States* v. *Cox,* 752 F.2d 741, 746 (1st Cir. 1985); *United States* v. *Johnson,* 713 F.2d 633, 640 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984); *United States* v. *Marable,* 574 F.2d 224, 231 (5th Cir. 1978).

The district court properly found the proffer of Heymans' testimony in this case to be inadequate. At best, the proffer did nothing more than establish that petitioner did not have the intent to engage in drug smuggling prior to the first meeting with Agent Peterson. It did nothing to provide an innocent explanation for petitioner's subsequent conduct, which was the portion of the case against petitioner that was recorded on tape and played for the jury. Heymans' affidavit was simply silent as to that evidence, even though

Heymans was present during those meetings. Nor does the affidavit provide any explanation for petitioner's lack of any expression of surprise when it became clear that the meetings concerned narcotics, not investments in cattle and timber. For that reason, the district court clearly acted within its discretion in finding that Heymans' affidavit was insufficiently specific and insufficiently helpful to petitioner to require a severance.

Neither *Inadi* nor *Bourjaily* altered the test for granting a severance in a conspiracy case. Indeed, neither case is remotely pertinent to the question presented here. In *Inadi*, the Court held that the unavailability of an unindicted co-conspirator is not a prerequisite to the use at trial of his co-conspirator declarations. In so holding, the Court observed that the Compulsory Process Clause would have aided Inadi in obtaining the testimony of his unindicted co-conspirator if Inadi had desired to call the co-conspirator as a witness. 475 U.S. at 397. The Court never suggested, however, that it was altering the traditional test for determining when to sever the trials of indicted co-conspirators.

Nor does *Bourjaily* have any application here. In that case, the Court held that in establishing the admissibility of co-conspirator statements, the government may use the statements themselves to show by a preponderance of the evidence the existence of a conspiracy and the declarant's membership in it. There is no discussion of severance or the Compulsory Process Clause in *Bourjaily*.

In sum, the granting of a severance continues to rest in the sound discretion of the district court, as the courts of appeals uniformly hold. Petitioner has not shown that there was any abuse of that discretion here under the standards that apply when a co-defendant indicates that he would testify on behalf of a defendant if a severance is granted. Accordingly, further review of this issue is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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